No. 79615-7

MADSEN, J. (concurring)—The Court of Appeals and the majority have analyzed this case as involving a public policy tort claim based on termination allegedly arising from employees engaging in "concerted activities." This is not correct. The public policy of protecting employees' right to engage in "concerted activities" was mentioned for the first time in the plaintiffs' appellate brief. Although the plaintiffs framed their first claim as a cause of action for termination in violation of public policy and they asserted a second claim based upon whistleblowing, they did not identify *any* clear public policy involved with the right to engage in concerted activity that was violated as a result of their termination.

The test adopted in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996), requires the plaintiffs to identify the public policy that was offended by their termination, and plaintiffs did not identify the right to engage in

concerted activity as a public policy that was violated by their termination. Accordingly, I concur in the result reached by the lead opinion.

ANALYSIS

In *Gardner*, this court adopted Henry Perritt Jr.'s comprehensive four part test for analyzing the tort of wrongful discharge in violation of public policy. *See* Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* §§ 3.7-3.21 (1991). The first prong of the test requires the plaintiffs to prove the existence of a clear public policy (the clarity element). *Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 181, 125 P.2d 119 (2005). This element requires a plaintiff to establish the existence of a clear mandate of public policy and is a question of law for the court. *Id.* The second prong of the test requires the plaintiffs to prove that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element). *Gardner*, 128 Wn.2d at 941. As a part of the burden under this step, the plaintiff also must show that other means of promoting the public policy are inadequate. *Korslund*, 156 Wn.2d at 182; *Gardner*, 128 Wn.2d at 945. The next prong requires the plaintiffs to prove that the public-policy-linked conduct caused the dismissal (the causation element). *Gardner*, 128 Wn.2d at 941.

If the plaintiff produces the proof required, the fourth prong of Perritt's test provides that the defendant must not be able to offer an overriding justification for the dismissal (the absence of justification element). *See also Collins v. Rizkana*,

73 Ohio St. 3d 65, 69-70, 652 N.E.2d 653 (1995) (adopting Perritt's four element test).

This case is here on review of a grant of summary judgment in favor of Nova Services, plaintiffs' employer. In a summary judgment proceeding, the moving party bears the initial burden of showing an absence of a material issue of fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is the defendant and meets the requirement of this initial showing, which may be done by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, then the inquiry shifts to the party with the burden of proof at trial—the plaintiff. *Id*. At this point, summary judgment should be granted in favor of the defendant if the plaintiff fails to make a showing sufficient to establish an element essential to the plaintiff's case and on which the plaintiff will bear the burden of proof at trial. *Id*.

Plaintiffs identified two concerns allegedly showing a violation of public policy. In their first cause of action they alleged:

> III. FIRST CAUSE OF ACTION
> WRONGFUL TERMINATION IN VIOLATION OF
> PUBLIC POLICY
>
> . . . .
>
> 3.2 The conduct of Defendants as alleged in paragraphs 1.1 through 2.10 constitutes wrongful termination in violation of public policy. *Plaintiffs raised concerns about health and safety of clients, wage and hour violations and other potential violations and poor practices, the existence of which violated public policy*; discouraging the conduct of plaintiffs jeopardized public policy; the Plaintiffs' complaints led directly to their dismissals; and Defendants can show

> no other overriding justification for Plaintiffs' dismissals.
>
> . . . .
>
> 3.4 Plaintiffs took reasonable steps to notify Brennan and Nova's Board about their concerns to no avail. Defendants failed to provide adequate preventative and remedial measures to prevent and/or stop unlawful conduct.

Clerk's Papers (CP) at 7-8 (emphasis added).

The facts set out in the complaint show that this first cause of action focused on the management of Nova and Executive Director Linda Brennan's performance and behavior, but the complaint does not identify any public policy, much less any statute, rule of law, or other source setting forth public policy violated by the conduct they identified.

In *Gardner*, 128 Wn.2d at 941, we placed the burden on plaintiffs to prove the existence of a clear public policy. This burden is necessary because the crux of the tort is the requirement that plaintiffs prove their termination violated a clear mandate of public policy. Proof of each of the other elements of the tort depends in turn on what specific public policy has been violated by the firing. In precise terms, a plaintiff must establish a "*clear mandate of public policy*." *Korslund*, 156 Wn.2d at 181 (emphasis added). Vague claims that "health and safety of clients, wage and hour violations and other potential violations and poor practices" violated public policy does not satisfy plaintiffs' burden to identify and prove the existence of clear public policy, which they claim has been violated by their termination.

At the hearing on the motion for summary judgment, the trial court gave the plaintiffs the opportunity to identify the basis for their public policy tort. First the judge stated his understanding that a violation of public policy is generally found "where employees are fired for refusing to commit an illegal act," "for performing a public duty or obligation," "for exercising a legal right of privilege," or "in retaliation, i.e. whistle-blowing." Verbatim Report of Proceedings at 27. The judge then asked plaintiffs' counsel "to explain and show why in each of these plaintiffs' cases they have adequately responded to summary judgment motions." *Id*. In response, plaintiffs' counsel said,

> [Ms. Clark] believes there's a duty to provide a decent positive work environment for their clients. . . . [I]n this case the issue is one of what the duty of this organization [(Nova Services)] was to [sic] to the public, to the community, to its employees, and to [sic] most importantly to its clients. And I think there is a public policy issue there. I think non-profits claim charitable status, they claim exception from taxes, and they claim to have a mission and purpose that's carried out that's intended to carry out the obligations under the internal revenue code that they have.
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> . . . I think there are also scandals related to non-profit entities where non-profit entities have essentially abrogated their responsibilities to their missions and their purpose by misusing funds, by not providing the services that their charitable purpose was set out to provide and somebody needs to call them on that and that's what these employees were trying to do.
>
> . . . This was an effort for these [plaintiffs] to have the board of directors hear what was really going on and that I think is a matter of public policy.

Id. at 27-29.

Judging from counsel's argument at summary judgment and the complaint,

it appears the public policy urged in plaintiffs' first claim is a broad public policy favoring efficient management of charitable organizations. Plaintiffs claimed they were terminated for complaining about Nova's executive director and her failure to appropriately serve the public and Nova's clients.

Counsel's argument at the summary judgment hearing was reiterated at oral argument in this court, where counsel conceded plaintiffs' complaint was not about dissatisfaction with how they were treated as employees, but rather, it was about how the organization was falling short of its duty to the public to provide appropriate services to the disabled.

Plaintiffs' April 6, 2004, letter to the Nova board members also expresses this "public policy" concern about mismanagement of Nova. For example, after introducing themselves to the board, the plaintiffs first point to the board was that "Nova has not . . . truly lived up to its potential. After 20 years of operations, Nova's accomplishments are rather modest. Simply put, Nova has under performed. . . . Unfortunately, Nova's CEO [(chief executive officer)] has become seriously ineffective and disengaged." CP at 73 (Aff. of Darlene Fogal, ex. 1).

The letter outlines the failures of Executive Director Brennan in several management areas, including Brennan's leadership style ("Effective leadership requires setting a consistently positive example by taking on the tough jobs while still delegating effectively. This is not the case at Nova."); administrative ability ("An effective, efficient administration requires the appropriate delegation of

authority and responsibility. Yet, managers at Nova often find themselves involved with trivial duties and responsibilities."); financial acumen ("In a non-profit, the ability to raise philanthropic capital is critical to fulfilling mission of the organization. The CEO should be involved in all aspects of fundraising, but she is not."); board development ("[I]t appears to us that Nova's Board is underdeveloped, undersized and kept in the dark by the Executive Director. Board development is a key area of responsibility for any Executive Director but that does not appear to be happening."); establishing corporate culture ("Open communication is not fostered at Nova. . . . Creativity and taking initiative are discouraged rather than nurtured."); and fostering community and government relations ("Nova has no public relations policies or program."). *Id*. at 73-76.

In short, the issue whether the employees were terminated in violation of a public policy regarding their rights to engaging in "concerted activities" was not asserted and was not before the trial court when it granted summary judgment to Nova.[1]

[1] In contrast, to the extent that plaintiffs identified a clear public policy, they did so in the second claim in their complaint where they asserted they had been unlawfully terminated as "whistleblowers." ("The substantial factor in deciding to terminate Plaintiffs was their actions as 'whistleblowers' in complaining to the Board and to outside agencies of Defendants actions in violation of public policy." CP at 8). Also, some of the language in plaintiffs' first claim can be read to suggest that they were terminated because they complained about unlawful conduct, i.e. because they were "whistleblowers," however, their second claim more clearly identifies this theory. Indeed, in the final paragraph of their April letter, plaintiffs summarize: "Please realize that we are essentially 'whistle blowing' by sharing this information with you." CP at 76. Plaintiffs have not challenged the trial court's dismissal of their whistleblowing claim.

Moreover, even if one did conclude that the plaintiffs sufficiently identified the public policy of protecting workers' rights to engage in concerted activity, the plaintiffs also failed to establish a prima facie case with respect to the second element of the Perritt test. To meet this prong, the plaintiff must establish that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy they contend was violated. As we have carefully explained, as part of this requirement, the plaintiff must establish that "other means of promoting the public policy are inadequate." *Korslund*, 156 Wn.2d at 182; *Hubbard v. Spokane Cy.*, 146 Wn.2d 699, 713, 50 P.3d 602 (2002); *Gardner*, 128 Wn.2d at 945.

Here, the plaintiffs made no attempt to show that the only way to promote the public policy of protecting the right to engage in concerted action was through a tort claim. For this reason as well the plaintiffs failed to sufficiently establish the prima facie case. That they failed to do so is most likely due to the fact that the right to engage in concerted action was, before raised on appeal, never identified by plaintiffs as the public policy at all. Regardless, this failure, too, means that the employer was entitled to summary judgment.

The dissent relies on the court's decision in *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995), and points out that the court determined that the policy articulated in RCW 49.32.020, the "'little Norris-LaGuardia statute,'" offers broader protections than the purpose of the statute. Dissent at 2. It is also true that when the question of the adequacy of other protections involves only

examination of existing laws, the question may be one of law for the court. *Korslund*, 156 Wn.2d at 182. However, neither of these relieves the plaintiff of the obligation to establish a prima facie case in order to withstand summary judgment.

First, *Bravo* was decided before the court adopted the Perritt test, identifying the elements of the public policy wrongful discharge tort. The determination in that case that the plaintiffs were entitled to assert a claim for wrongful discharge in violation of public policy is based on the court's conclusion that RCW 49.32.020 conferred substantive rights on nonunion employees to be free of interference, restraint, or coercion, and expressed important public policy conferring actionable rights on the employees. *Bravo*, 125 Wn.2d at 758. The court concluded from the legislature's declaration of intent and its own construction of the statute that a discharge that violated the statute also gave rise to a tort of discharge in violation of a clear mandate of public policy. *Id*. Thus, the court effectively equated the right to bring an action under the statute with a right to bring the tort claim. However, the court did not engage in the inquiry whether the statute's existing protections were adequate to protect the public policy at stake. At the time, that was simply not part of the analysis. Now, it is.

Second, while the adequacy of existing protections may in some instances be a question of law for the court, the issue here is whether summary judgment was properly granted. For this purpose, the question is whether plaintiff

sufficiently countered the defendant's motion for summary judgment by presenting a prima facie case of wrongful discharge in violation of public policy.

I would hold that summary judgment should be affirmed, but not for the reasons offered by the majority. The court should not address the issue whether plaintiffs were discharged in violation of public policy protecting workers' rights to engage in concerted activity. That issue was never before the trial court. Even if one assumes it was, plaintiffs failed to establish a prima facie case on the elements of the cause of action, specifically on the second element.

I concur in the result reached by the lead opinion.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR: